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IN THE

Supreme Court of the United States

October Term, 1969.

No. 1457

NORTHERN ACCEPTANCE TRUST 1065 by C. JON HANDY, TRUSTEE, and DERICKSEN M. BRINKERHOFF,

Petitioners,

v.

HONORABLE WILLIAM P. GRAY, United States District Judge, Central District of California, and AMFAC, INC., THE LIHUE PLANTATION CO., LTD., PUNA SUGAR CO., LTD., KEKAHA SUGAR CO., LTD., THE LIHUE PLANTATION CO., LTD., a wholly-owned subsidiary of Amfac, Inc., PUNA SUGAR CO., LTD., a wholly-owned subsidiary of Amfac, Inc., KEKAHA SUGAR CO., LTD., a wholly-owned subsidiary of Amfac, Inc., WAIMEA SUGAR CO., LTD., H. A. WALKER, JR., K. H. BERG, J. RUSSELL CADES, H. C. EICHELBERGER, C. HUTTON SMITH, J. E. EDNIE, R. A. VAN ORSDEL, JR., M. A. PIETSCHMAN, THOMAS BOWMAN, WILLIAM K. DONNELLY, J. E. LOOMIS, W. A. KRUSE, W. J. BALDWIN, D. T. SILVER, WILLIAM H. BOMKE, R. LESLIE HOFFMAN, RALPH E. PHILLIPS, FRED H. MERRILL, KENNETH F. BROWN, LEROY C. BUSH, GILBERT E. COX, C. DAGGETT HARVEY, JOHN C. WALKER, RALPH T. YAMAGUCHI, S. W. WILCOX, F. W. BROADBENT, G. W. FISHER, SR., JOHN PATTERSON, HERBERT C. SHIPMAN, L. A. FAYE, JO L. FULLER, R. GREGG ANDERSON, DEAN WITTER & CO., INC., HASKINS & SELLS, FIREMAN'S FUND INSURANCE CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Northern Acceptance Trust 1065 by C. Jon Handy, Trustee, and Dericksen M. Brinkerhoff hereby petition that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit filed in this case on March 23, 1970.

OPINIONS BELOW.

The opinion of the District Court granting respondents' Motion to transfer this federal securities action from the Central District of California to the District of Hawaii, delivered from the bench and not officially reported, is printed in Appendix A, pp. A6-9. The opinion of the Court of Appeals denying petitioners' request for a writ of mandamus is not yet officially reported and is printed in Appendix A, pp. A16-19.

JURISDICTION.

The decision and judgment of the Court of Appeals of which review here is sought was filed on March 23, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

The following decisions exemplify and sustain the jurisdiction of this Court:

Schlagenhauf v. Holder, 379 U. S. 104 (1964)
Beacon Theatres, Inc. v. Westover, 359 U. S. 500 (1959)

QUESTIONS PRESENTED.

In the cases of *Ex Parte Collett*, 337 U. S. 55 (1949) and *United States v. National City Lines*, 337 U. S. 78 (1949), this Court held that although 28 U. S. C. § 1404(a) was applicable to cases commenced pursuant to the special

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venue provisions of the Federal Employers' Liability and Clayton Acts, it neither repealed such provisions nor modified the rights granted thereunder. *Ex Parte Collett*, 337 U. S. at 59-60. The single question presented is whether district courts may apply Section 1404(a) in a manner which would effectively nullify and repeal the special venue provisions of Section 27 of the Securities Exchange Act of 1934 ("1934 Act"), 15 U. S. C. § 78aa, and Section 22 of the Securities Act of 1933 ("1933 Act"), 15 U. S. C. § 77v, by transferring securities actions despite substantial contacts with the threshold forum, thereby discouraging shareholders' suits contrary to the letter and spirit of this Court's opinions in *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970) and *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964).

STATUTORY PROVISIONS INVOLVED.

The statutes involved are the following:

Section 27 of the Securities Exchange Act of 1934, 15 U. S. C. § 78aa, provides in pertinent part:

> "The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have *exclusive jurisdiction* of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein *any act or transaction constituting the violation occurred.* Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations may be brought in *any such dis-*

trict or in the district wherein the defendant is found or is an inhabitant or *transacts business,* and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found . . ." (Emphasis supplied.)

Section 22 of the Securities Act of 1933, 15 U. S. C. §77v, provides in pertinent part:

"The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or *transacts business,* or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found . . ." (Emphasis supplied.)

28 U. S. C. § 1404(a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

This action was commenced by petitioners, residents of the Los Angeles area, in the United States District Court for the Central District of California for violations, *inter alia*, of Sections 10(b), 15 U. S. C. § 78j, and 14(a), 15 U. S. C. § 78n, of the 1934 Act, Rules 10b-5, 17 CFR § 240.10b-5, and 14a-9, 17 CFR §240.14a-9, promulgated thereunder and Section 17(a), 15 U. S. C. § 77q, of the 1933 Act.[1] The jurisdictional basis for the federal securities claims were special venue provisions, Section 27 of the 1934 Act and Section 22 of the 1933 Act.[2] In particular, jurisdiction was based on the facts that "acts and transactions constituting the violations occurred in the Central District of California" and that each respondent "transacts business in the Central District of California."[3]

Petitioners commenced this action both as a class action on behalf of themselves and all other minority shareholders of The Lihue Plantation Co., Ltd. ("Former Lihue"), Puna Sugar Co., Ltd. ("Former Puna") and Kekaha Sugar Co., Ltd. ("Former Kekaha") and as a derivative action on behalf of said corporations against Amfac, Inc. ("Amfac"), Former Lihue, Former Puna, Former Kekaha,[4] The Lihue Plantation Co., Ltd. ("New Lihue"), Puna Sugar Co., Ltd. ("New Puna"), Kekaha Sugar Co., Ltd. ("New Kekaha"),[5] Waimea Sugar Co., Ltd., Dean Witter & Co., Inc. ("Dean Witter"), Haskins &

1. A copy of petitioners' complaint is printed in Appendix B, pp. A20-46.

2. Appendix B, pp. A21, 37.

3. Appendix B, pp. A28, 37.

4. The latter three corporations were sued as nominal defendants since this action was brought derivatively on their behalf.

5. The latter three corporations were sued, *inter alia*, as wholly-owned subsidiaries of Amfac and as successors to Former Lihue, Former Puna and Former Kekaha.

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Sells, Fireman's Fund Insurance Co. and 32 individual defendants.[6] Of the individual defendants, 29 are employees, officers and/or directors of Amfac and/or its wholly-owned subsidiaries, New Kekaha, New Lihue and New Puna, one is a director of Amfac and officer of Dean Witter and one is an employee of Dean Witter.

This action resulted from Amfac's acquisition of the minority stockholders' interests in and assets of Former Lihue, Former Puna and Former Kekaha, corporations dominated and controlled by Amfac, through materially false and misleading proxies and other statements.

The question presented here arises from a motion for change of venue filed by respondents under 28 U. S. C. §1404(a). Upon completion of discovery relating to said motion and after final briefs and affidavits were filed, the District Court decided orally from the bench on December 15, 1969 that the case should be transferred to the United States District Court for the District of Hawaii,[7] and on December 16, 1969 so ordered.[8]

On December 29, 1969, petitioners filed a petition for writ of mandamus under and pursuant to App. Rule 21 in the United States Court of Appeals for the Ninth Circuit. Pursuant to petitioners' motion and an Order of the Court of Appeals, briefs were filed and oral argument was held on March 9, 1970.

On March 23, 1970, the Court of Appeals refused to disturb the District Court's decision because (Appendix A, p. A19):

> "Review of the court's order would thus entail a *de novo* balancing by this court of the competing factors bearing upon convenience and the interests of

6. Appendix B, pp. A22-27.

7. The oral findings of the District Court are printed as its opinion in Appendix A, pp. A6-9.

8. The Order of the District Court is printed in Appendix A, pp. A10-11.

justice. Mandamus does not and should not issue for such a review."

The decisions of the District Court and the Court of Appeals were rendered despite the fact that this remedial securities action was commenced pursuant to the special venue provisions of the 1933 and 1934 Acts and despite undisputed substantial contacts with the threshold forum and the State of California.

1. The wellspring of petitioners' action occurred on July 24, 1968, when respondent Amfac held a regular meeting of its Board of Directors at its Silverado Country Club in Napa, California.[9] The minutes of the meeting vividly demonstrate that virtually all of the Amfac directors and senior officers found it convenient to be present (Walker Dep. Ex. No. 1, p. 3). The *very transaction* which constitutes the gravamen of the complaint, namely the acquisition by Amfac of the minority stockholders' interests in and assets of Former Kekaha, Former Lihue and Former Puna, was a primary subject of the meeting *and was affirmatively voted upon by the Amfac Board of Directors at that time* **in California** (Walker Dep. Ex. No. 1, p. 4).

2. On Monday, July 22, 1968, the members of the Amfac Capital Study Committee, Eichelberger, Cox, Walker, Phillips and Hoffman, all directors of Amfac and respondents herein, met in the *Los Angeles office of Dean Witter* to discuss, *inter alia,* the acquisition by Amfac of the minority stockholders' interests in and assets of Former Kekaha, Former Lihue and Former Puna (Walker 109-111; Berg 82, 92-93; Hoffman 23-24).[10] Significantly, two of the five

9. See p. 8, *infra.*

10. All references to the transcripts of the oral depositions will be preceded by the name of the deponent and followed by the page numbers. In successive citations, the name of the deponent will not be repeated where he remains the same.

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members of said Committee, Phillips and Hoffman, reside in California and *Phillips was the chairman* (Hoffman 24; Merrill 42; Walker Dep. Ex. No. 1, p. 4). The primary, indeed crucial, role played by the Capital Study Committee in the transactions which form the basis of the complaint cannot be ignored since it, *inter alia*, studied and recommended the exchange ratios for the acquisition of the minority stockholders' interests and assets which were adopted by the Board of Directors **in California** on July 24, 1968 (Berg 92-93; Walker Dep. Ex. No. 1, p. 4).[11]

3. Respondent Dean Witter's appraisals of Former Kekaha, Former Lihue and Former Puna, which were **the only appraisals** *before Amfac's Board of Directors and Capital Study Committee,* were prepared under the supervision and direction of Phillips and Alan Hoefer, then a partner in Dean Witter and, like Phillips, a Los Angeles resident.[12] In early 1968, Eichelberger, chief executive officer and member of the Capital Study Committee of Amfac, invited Phillips to have the *Los Angeles office of Dean Witter,* under the supervision and with the participation of Phillips, prepare three appraisals to be relied upon by Amfac's Capital Study Committee and Board of Directors in recommending the acquisition by Amfac of the minority stockholders' interests in and assets of Former Kekaha, Former Lihue and Former Puna (Phillips 14-16, 18-21, 24-26, 29, 32; Hoffman 24-25; Merrill 12-14, 28-29; Berg 75, 92-93; Harvey 11). Phillips and Hoefer assumed the major responsibility for the preparation of the three appraisals by their Los Angeles staff (Phillips 18-21, 27, 29, 34; Hoffman 24-25; Merrill 14). Not only did Amfac proceed substantially along the lines suggested by the Dean

11. The Amfac Capital Study Committee again met in Los Angeles on April 27 and 28, 1969 and once again Phillips, Hoffman, Walker, Eichelberger and Cox were present (Walker 139).

12. Hoefer no longer is a partner or employee of any respondent herein and would not be subject to subpoena from the District Court of Hawaii.

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Witter appraisals, but *they were the only appraisals* before Amfac's Capital Study Committee and Board of Directors when the acquisition of the minority stockholders' interests and assets were recommended and affirmatively voted upon in *California* (Phillips 32; Hoffman 25; Merrill 12-13, 28-29; Berg 75, 92-93; Harvey 11).

4. During the period of February 15-20, 1969, Walker and virtually all of the senior officers of Amfac attended an Amfac management retreat and planning conference *held in California* to formulate and present business plans and projections for each of Amfac's divisions *for the next five years* (Walker 129-130; Berg 53-54).

5. Several wholly-owned subsidiaries of Amfac derive all of their revenues from operations on the mainland United States. *Airport Marina Hotel,* located in Los Angeles, adjacent to the Los Angeles International Airport, leases approximately eight acres including a hotel of approximately 800 rooms (2R. 427, 615; 3R. 865; Walker 91-94).[13] *Amfac Silverado Corp.,* located in Napa, California, owns approximately 940 acres of land including a small office building (3R. 864; Walker 91-94). *Silverado Country Club & Resort, Inc.,* located in Napa, California, owns approximately 343 acres including two golf courses, clubhouse and tennis courts (*Ibid.*). *Fred Harvey, Inc.,* with offices in Los Angeles and San Francisco, has 17 facilities in California, four facilities in Arizona, two facilities in New Mexico, one facility in Nevada and one facility in Washington (3R. 867-868; Walker 91-94, 120). *Fred Harvey Transportation Co., Rainier National Park Co.* and *Sequoia & Kings Canyon National Parks Co.,* have operations, among other places, in California and Washington (2R. 618;

13. All citations to the Record ("R.") in the Court of Appeals will be preceded by the volume and followed by the page numbers. In successive citations, the volume will not be repeated where it remains the same.

Walker 91-94). *Joseph Magnin, Inc., Joseph Magnin South, Inc.* and *Jomanco, Inc.*, all with their principal places of business in San Francisco, have a total of 29 retail stores in California and 3 retail stores in Nevada (2R. 623-624; 3R. 867; Walker 91-94). *Rhodes Western*, with its principal place of business in Oakland, California, has retail stores in Oakland, Sacramento, Concord, Fresno and Palo Alto, California, Portland, Oregon, Tacoma, Washington and Phoenix, Arizona (3R. 866-867; Walker 90). *Neilson Way Corp.*, with its only place of business in Santa Monica, California, is developing 20 acres of beachfront land located in Santa Monica (3R. 864; Walker 94; Hoffman 44; Phillips Dep. Ex. No. 3, p. 15). *Financial Development Corp.*, with its principal place of business in Los Angeles, has other places of business in San Francisco, Oakland, San Jose, Hawthorne, Sherman Oaks, Santa Ana and Santa Monica, California (3R. 867; Walker 90-91). *Accent Enterprises, Inc.*, with its principal place of business in Fullerton, California, has other places of business in Fallbrook and Vista, California (3R. 866; Walker 90-91). *Island Holidays Travel Service*, a wholly-owned subsidiary of Island Holidays which is a wholly-owned subsidiary of Amfac, has offices in Los Angeles, San Francisco and Seattle, Washington (2 Walker 5-6).

6. Amfac and its wholly-owned subsidiaries presently have from 6,000 to 7,000 employees on the mainland United States (2 Walker 6). Amfac even operates an office in San Francisco for auditing its mainland operations (3R. 864-865; 2 Walker 6-7).

7. C & H, a nonprofit agricultural cooperative with its offices and refinery in California, is owned by all sugar plantations in Hawaii (Hoffman 49-50; Merrill 45; Berg 21-22; Phillips Dep. Ex. No. 3, p. 12). Through five wholly-owner sugar plantations, including New Kekeha, New Lihue

and New Puna, Amfac owns 26% of C & H (Berg 86-89). Significantly, 93% of Amfac's sugar production is refined by C & H at its Crockett, California refinery and by other refining companies located on the mainland United States (Berg 88).[14]

8. Amfac's stock is listed both on the Pacific Coast Stock Exchange and the New York Stock Exchange (Walker 61).

9. Amfac maintains banking connections on the mainland United States with First National City Bank, Wells Fargo Bank, Bank of California, Bank of America, Crocker Citizens Bank, Security First of Los Angeles and San Francisco and United California Bank (Walker 34-36). All of the aforesaid banks, with the exception of the First National City Bank, have their main offices and principal places of business *in California* (*Ibid.*).

10. Since at least 1967 Amfac's management consultant has been McKinsey & Co. (Walker 28-29), and Amfac has had a continuing relationship with the McKinsey office located in San Francisco (Walker 29). The importance of this contact is demonstrated by the continuous travel of Amfac officers to San Francisco for the purpose of reviewing with representatives of McKinsey & Co. Amfac's management structure, long-range planning, profit improvement and mainland acquisitions (Walker 117-119, 121, 124, 132, 135-136, 142, 144, 147-148).[15]

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14. Respondents Berg and Walker are members of the Board of Directors of C & H and *regularly attend meetings of its Board held in California* (Berg 34-37, 62-64, 68-69; Walker 107, 120, 143-144, 154).

15. Representatives of Amfac have continually met with substantial mainland shareholders in order to bring them up-to-date on current or contemplated Amfac activities (Walker 45-46, 49-50, 52-53, 62-63, 99).

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11. On August 15, 1969, Amfac again held a *regular meeting of its Board of Directors* at its Airport Marina Hotel in Los Angeles,[16] and virtually all of the directors and twelve vice-presidents found it convenient to be present (Walker Dep. Ex. No. 2, p. 3). Numerous mainland activities were discussed and acted upon at this meeting (Walker Dep. Ex. No. 2, pp. 5-11).

Despite the substantiality of contacts with the forum chosen by petitioners pursuant to the special venue provisions of the 1933 and 1934 Acts, the District Court ordered transfer and the Court of Appeals refused to issue a writ of mandamus. The District Court's decision obviously was not based on considerations properly applicable in a special venue case, but rather on the kind of balancing of conveniences required by Section 1404(a) in cases *not commenced pursuant to special venue statutes.* Even under the balancing standard, however, the District Court stated that it was "a very close case" which gave it "a lot of trouble." Appendix A, pp. A6, 9. Neither the District Court nor the Court of Appeals considered petitioners' contention that transfer was impermissible *as a matter of law,* since this action had been commenced under the special venue provisions of the 1933 and 1934 Acts and since the contacts with the threshold forum were and continue to be substantial under any standard.

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16. Amfac also held a meeting of its Board of Directors at Silverado, Napa, California in May, 1967 (Berg 27; Walker 37-39).

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REASONS FOR GRANTING THE WRIT.

In 1949, this Court held that Section 1404(a) was applicable to cases commenced under the special venue provisions of the Federal Employers' Liability Act, *Ex Parte Collett*, 337 U. S. 55, and the Clayton Act, *United States v. National City Lines*, 337 U. S. 78. In both cases, Justices Black and Douglas dissented on the ground that the Court had mutilated the special venue provisions underlying all remedial federal legislation, including Section 27 of the 1934 Act and Section 22 of the 1933 Act. 337 U. S. at 84-85. In rejecting their dissent, this Court stated that the application of Section 1404(a) to special venue provisions was not intended to repeal them or to modify any rights granted thereunder, 337 U. S. at 59-60, and acknowledged that Congress had rejected the much more drastic Jennings Bill which would have partially repealed the special venue provision of the Federal Employers' Liability Act. 337 U. S. at 63-64.

Since 1949, considerable confusion has developed in the lower courts with respect to the *scope* of application of Section 1404(a) in the special venue context. Compare *Ford Motor Co. v. Ryan*, 182 F. 2d 329, 332 (2d Cir. 1950) *cert. denied* 340 U. S. 851 (1950), *Herbst v. Able*, 278 F. Supp. 664, 666 (S. D. N. Y. 1967) and *Zorn v. Anderson*, 265 F. Supp. 745, 749 (S. D. N. Y. 1966), which recognize the remedial policy and purpose underlying special venue provisions, with *Fogel v. Wolfgang*, 1969 CCH Sec. Law Rep. ¶ 92,472 at pp. 98,230-98,231 (S. D. N. Y. 1969), *Silverman v. Wellington Mgmt. Co.*, CCH Sec. Law Rep. '67-'69 Dec. ¶ 92,355 at pp. 97,684-97,685 (S. D. N. Y. 1969), *Schlusselberg v. Werly*, 274 F. Supp. 758, 763 (S. D. N. Y. 1967) and *Schneider v. Sears*, 265 F. Supp. 257, 266

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(S. D. N. Y. 1967), which accord little or no weight to choice of forum in special venue contexts.[17]

The current case illustrates the misconstruction which some lower courts have placed on this Court's holdings in *Ex Parte Collett* and *United States v. National City Lines, supra.* By focusing *solely* on the convenience of parties and witnesses and ignoring the remedial policy and purpose underlying the special venue provisions of the 1933 and 1934 Acts, the District Court effectively nullified and repealed said provisions. Hereafter, *no* case will remain in a special venue forum if the defendants reside elsewhere, as they do in virtually every case where the special venue provisions are invoked as a foundation for derivative or class litigation under the 1933 and 1934 Acts. Moreover, the certainty of transfer in such cases would operate to discourage remedial litigation by small shareholders who are unable to afford the expense and inconvenience of pressing claims against large corporations and their executives in distant forums. This obviously would conflict with a consistent line of cases in which this Court has sought to *encourage* the private enforcement of Sections 10(b) and 14(a) of the 1934 Act and Rules 10b-5 and 14a-9 promulgated thereunder. *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375 (1970); *Tcherepnin v. Knight*, 389 U. S. 332 (1967); *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964); cf. *SEC v. Natl. Securities, Inc.*, 393 U. S. 453 (1969) and *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S. 180 (1963).

1. Section 27 of the 1934 Act contains the *broadest* special venue provision available to federal litigants since

17. Significantly, the source for minimizing choice of venue in special venue contexts is *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U. S. 518, 524 (1947), in which a shareholder's derivative suit was commenced under state substantive law, not the federal securities laws, and was based on diversity of citizenship of the parties, not the special venue provisions of the 1933 and 1934 Acts.

it confers jurisdiction in any district in which "any act or transaction constituting the violation occurred." In essence, *one act* is sufficient under the special venue provisions of Section 27. *Wyndham Associates v. Bintliff*, 398 F. 2d 614, 620 (2d Cir. 1968); *Errion v. Connell*, 236 F. 2d 447, 455 (9th Cir. 1956); *Wharton v. Roth*, 263 F. Supp. 922, 923-924 (E. D. N. Y. 1964); *Zorn v. Anderson*, 263 F. Supp. at 748 (S. D. N. Y. 1966); *Clapp v. Stearns & Co.*, 229 F. Supp. 305, 307 (S. D. N. Y. 1964); *Dauphin Corp. v. Redwall Corp.*, 201 F. Supp. 466, 469-470 (D. Del. 1962); *Dauphin Corp. v. Davis*, 201 F. Supp. 470, 472 (D. Del. 1962). As Professor Loss succinctly summarized:

> "So far as the venue provision of the Exchange Act is concerned, the reference to the district wherein any 'act or transaction constituting the violation occurred' *requires literally but one act*, even though others of the acts necessary to result in a violation occurred elsewhere." III Loss, *Securities Regulation*, p. 2009 (2d Ed. 1961) (Emphasis supplied.)

Section 22 of the 1933 Act is similar to the special venue provision contained in Section 12 of the Clayton Act, 15 U. S. C. § 22, since both are based on transacting business.

This Court repeatedly has recognized that the special venue provision of the Clayton Act is a salutary supplement essential to the attainment of the remedial objectives of the antitrust laws. In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927), this Court held that the words "transacts business" in Section 12 of the Clayton Act were intended by Congress to expand the forums in which corporations could be sued under the antitrust laws, stating (273 U. S. at 373-374):

> "Thus construed, this section supplements the remedial provision of the Anti-Trust Act for the redress of in-

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juries resulting from illegal restraints upon interstate trade, by relieving the injured person from the necessity of resorting for the redress of wrongs committed by a nonresident corporation, to a district, however distant, in which it resides or may be 'found,'—often an insuperable obstacle,—and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business, and bring it before the court by the service of process in a district in which it resides or may be 'found.' "

Similarly, in *United States v. Scophony Corp.*, 333 U. S. 795 (1948), his Court applied its *Eastman Kodak* holding to a corporation incorporated outside the United States, stating the purpose of Section 12 of the Clayton Act as follows (333 U. S. at 808):

> "Thereby it relieved persons injured through corporate violations of the antitrust laws from the 'often insuperable obstacle' of resorting to distant forums for redress of wrongs done in the places of their business or residence. A foreign corporation no longer could come to a district, perpetrate there the injuries outlawed, and then by retreating or even without retreating to its headquarters defeat or delay the retribution due."

Thus, the holdings of this Court in *Eastman Kodak* and *Scophony* "substantially removed the serious obstacles and practical immunities to suit" which had previously evolved in antitrust litigation. 333 U. S. at 810.

An identical congressional motivation accounted for the enactment of Sections 22 and 27 of the 1933 and 1934 Acts, respectively. The only purpose served by any special venue provision is the opportunity accorded plaintiffs to

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choose a convenient forum. This purpose does not change because the nature of the remedial legislation changes. Accordingly, in *Hooper v. Mountain States Securities Corp.*, 282 F. 2d 195, 205 (5th Cir. 1960) *cert. denied.* 365 U. S. 814 (1961), a case involving Sections 27 and 10(b) of the 1934 Act, the Court declared:

> "It is apparent that the language in § 27 . . . describing the venue district as 'the district wherein any act or transaction constituting the violation occurred' cannot mean the district in which all acts took place, or in which the transaction as a whole was consummated. The statute was one designed to put an end to interstate frauds in the sale and trading of securities. The legislative pattern envisages the likelihood that actions would take place in many places requiring the frequent use of instrumentalities of the mail or of communication. The Act meant to vest jurisdiction in every district where any use of such instrumentalities of the mail or interstate commerce was of material importance to the consummation of the scheme."

Notwithstanding the congressional purpose of reinforcing remedial legislation by encouraging the commencement of actions in convenient forums, it is obvious that the "often insuperable obstacle of resorting to distant forums" for the commencement of federal securities litigation would still remain if such cases were routinely transferred to distant forums under Section 1404(a) regardless of substantial contacts with the threshold forum. If the decision below is not reversed, a small shareholder would have to be willing to maintain his action in a distant forum after transfer since *virtually every case commenced under the special venue provisions could be transferred because of the alleged inconvenience of defendants and their witnesses in litigating beyond their principal places of business and residences.*

If the special venue provisions of remedial federal legislation, such as the 1933 and 1934 Acts, are to have any purpose, litigants must be able to withstand transfer where, as here, respondents have substantial contacts with the special venue forum.[18] Otherwise, as Justices Black and Douglas warned, this Court will have permitted the "mutilation" and virtual repeal of all special venue provisions under the guise of fulfilling the congressional purpose underlying the enactment of Section 1404(a).

2. This Court has repeatedly recognized the public importance in encouraging *private* enforcement of Rules 10b-5 and 14a-9. For example, in *J. I. Case Co. v. Borak*, this Court stated (377 U. S. at 432):

> "Private enforcement of the proxy rules provides a necessary supplement to Commission action. As in anti-trust treble damage litigation, the possibility of civil damages of injunctive relief serves as a most effective weapon in the enforcement of the proxy requirements . . ."

Even more recently, in *Mills v. Electric Auto-Lite Co.*, this Court recognized that "private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute." 396 U. S. at 396; see also *Kahan v. Rosenstiel*, No. 18120, Slip Op., p. 7 (3rd Cir. Feb. 20, 1970).

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18. Section 1404(a) was properly applied in *Pacific Car and Foundry Co. v. Pence*, 403 F. 2d 949, 955 (9th Cir. 1968), even though that action was commenced pursuant to the special venue provision of the Clayton Act, since there neither party had any contact with the threshold forum. The current case presents an illustration of the other extreme. If this action is transferred to Hawaii notwithstanding the substantial contacts with California, no action in which a special venue provision is necessary to sustain jurisdiction and venue will withstand a motion to transfer under Section 1404(a). In short, the special venue provisions will have been rendered totally meaningless.

Significantly, this Court has held that Section 27 of the 1934 Act must be construed and applied in a way which will best accomplish the remedial purposes of the 1934 Act. *J. I. Case Co. v. Borak*, 377 U. S. at 433-434; see also *Mills v. Electric Auto-Lite Co.*, 396 U. S. at 381-385, *SEC v. Natl. Securities, Inc.*, 393 U.S. at 467-468, *Tcherepnin v. Knight*, 389 U. S. at 336, and *SEC v. Capital Gains Research Bureau, Inc.*, 375 U. S. at 195.

The importance of encouraging securities litigation, such as the case at bar,[19] has also been recognized by several Courts of Appeal, which have held that "'the ultimate effectiveness of the federal remedies' in this [Section 10(b)] area 'may depend in large measure on the applicability of the class action device.'" *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964); *Kahan v. Rosenstiel*, Slip Op. at pp. 11-12; *Green v. Wolf Corp.*, 406 F. 2d 291, 298, 301 (2d Cir. 1968) *cert. denied* 395 U. S. 977 (1969); *Esplin v. Hirschi*, 402 F. 2d 94, 99, 101 (10th Cir. 1968) *cert. denied* 394 U. S. 928 (1969).

If this Court permits cases commenced under the special venue provisions of the 1933 and 1934 Acts to be transferred under Section 1404(a), irrespective of the substantiality of defendants' contacts with the special venue forum, small shareholders will be discouraged from instituting the very litigation which this Court has consistently sought to encourage. The certainty of such cases being transferred will emasculate the special venue provisions of the 1933 and 1934 Acts.

This case presents this Court with a valuable opportunity to buttress its decisions in *Borak* and *Mills* by reaffirming the remedial importance of the special venue pro-

19. Any doubt as to the meritorious nature of this class and derivative federal securities action is eliminated by reference to the strikingly similar facts of *Swanson v. American Consumer Industries, Inc.*, 415 F. 2d 1326 (7th Cir. 1969), which was cited by this Court in *Mills v. Electric Auto-Lite Co.*, 396 U. S. at 384, n. 6.

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visions of the 1933 and 1934 Acts. Indeed, "it is the duty of the [federal] courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co. v. Borak*, 377 U. S. at 433. If transfer is permitted in this case under Section 1404(a) despite the substantial contacts with California, the special venue provisions have in fact been repealed, since no action requiring said provisions to sustain jurisdiction and venue could withstand a similar motion to transfer.

CONCLUSION.

For the reasons given above, it is respectfully submitted that this Court should grant the petition for a writ of certiorari to review the decision and judgment of the Court of Appeals for the Ninth Circuit.

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Dated: April 17, 1970

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APPENDIX A.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA.

No. 69-931 W. P. G.

NORTHERN ACCEPTANCE TRUST 1065 ET AL.,
Plaintiffs,

v.

AMFAC, INC., ET AL.,
Defendants.

ORDER FILED SEPTEMBER 22, 1969.

AND Now, to wit, this 8th day of September, 1969, after consideration of papers filed by the parties and after hearing, it is hereby ORDERED as follows:

(1) Defendants' Motion For Change Of Venue is continued for further hearing on Monday, November 3, 1969 at 10:00 a.m.

(2) In the interim, plaintiffs shall be permitted to proceed with discovery. Oral depositions shall be limited to the subject matter encompassed by defendants' Motion For Change Of Venue.

(3) Plaintiffs shall be permitted to file additional memoranda, affidavits, answers to interrogatories and deposition transcripts on or before Monday, October 27, 1969.

(4) Argument on the Motion of American Express Investment Management Company To Dismiss For Failure To

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State a Claim Upon Which Relief Can Be Granted, Or, In The Alternative For Summary Judgment shall be heard on Monday, September 22, 1969 at 10:00 a.m.

(5) Plaintiffs shall file their responsive memorandum relating to said Motion on or before Friday, September 12, 1969.

(6) In the event that the Court decides to treat said Motion as a Motion For Summary Judgment, plaintiffs shall be given reasonable opportunity to conduct discovery relevant to said Motion prior to any decision being rendered thereon.

(7) Plaintiffs shall not conduct discovery of American Express Investment Management Company until after disposition of the Motion of said Company to be argued on Monday, September 22, 1969.

Sept. 22, 1969

WILLIAM P. GRAY.
William P. Gray, *J.*

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA.

No. 69-931 WPG

NORTHERN ACCEPTANCE TRUST 1065, ET AL.,
Plaintiffs,

v.

AMFAC, INC., ET AL.,
Defendants.

ORDER FILED OCTOBER 17, 1969.

The Ex Parte Application for Order Enlarging Time submitted on behalf of the Applying Defendants, as defined therein, was presented for hearing on September 30, 1969, at 9:30 A.M., before the Honorable William P. Gray, United States District Judge. Plaintiffs appeared by their attorneys of record, Kenneth P. Kimmel, Esq., Bruce W. Kaufman, Esq. and David Pittinsky, Esq. The Applying Defendants appeared by their attorneys of record, Messrs. Adams, Duque & Hazeltine by Lawrence T. Lydick, Esq., Bruce A. Beckman, Esq. and Kevin J. Quinn, Esq. Defendant Haskins & Sells appeared by its attorneys of record, Loeb & Loeb by Alfred I. Rothman, Esq. The matter having been argued on behalf of all parties and submitted to the Court for its consideration, and the Court having duly considered the same and good cause appearing therefor,

IT IS HEREBY ORDERED:

A. Discovery and Motions Relating to the Complaint on File Herein.

1. The time within which all defendants may move, answer or otherwise plead to plaintiffs' Complaint herein

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and to object to or answer Plaintiffs' Interrogatories First Set is hereby enlarged to and including twenty (20) days after the date of the Court's Order deciding the pending Motion for Change of Venue.

2. The Depositions of H. Leslie Hoffman, Ralph E. Phillips, Fred H. Merrill, C. Daggett Harvey, H. A. Walker, Jr., C. Hutton Smith, H. C. Eichelberger, K. H. Berg, J. Russell Cades, Gilbert E. Cox, Kenneth F. Brown, Leroy C. Bush, John C. Walker, Ralph T. Yamaguchi, R. Gregg Anderson, Jo L. Fuller, S. W. Wilcox, John Patterson and Herbert C. Shipman which were noticed in Plaintiff's First Notice of Oral Depositions are hereby continued until such times as are mutually agreed upon by the parties hereto, but in no event shall such depositions commence prior to the expiration of twenty (20) days after the date of the Court's Order deciding the defendants' Motion for Change of Venue. Nothing herein shall prejudice the right of plaintiffs to re-notice such depositions to commence following such twenty-day (20) period, in the event no such times are mutually agreed upon. In the event such depositions are re-noticed, nothing herein shall prejudice the right of defendants to apply to the Court for such relief as they may deem proper.

B. Discovery and Hearing on Defendants' Motion for Change of Venue.

1. The depositions noticed in Plaintiffs' Notice of Oral Depositions re defendants' Motion for Change of Venue shall be re-scheduled by agreement between the parties and shall be concluded on or before December 1, 1969.

2. The hearing on defendants' objections to Plaintiffs' Interrogatories—Change of Venue is hereby set for November 3, 1969. Such objections shall be served seventeen (17) days prior to the date of the hearing thereon. If the Court

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requires defendants to answer any of the Plaintiffs' Interrogatories—Change of Venue which were objected to, defendants shall have to and including November 17, 1969 within which to file such further answers.

3. The time within which all defendants shall answer Plaintiffs' Interrogatories—Change of Venue not objected to is hereby enlarged to and including November 3, 1969.

4. The time within which defendant Amfac, Inc. shall answer or object to Plaintiffs' First Request for Admissions—Change of Venue is hereby enlarged to and including November 3, 1969.

5. The hearing on defendants' Motion for Change of Venue is hereby continued to December 15, 1969 at 10:00 A. M., in Courtroom 6, Federal Court Building, 312 North Spring Street, Los Angeles, California. Plaintiffs shall file and personally serve any additional papers in opposition to defendants' Motion for Change of Venue on or before December 8, 1969. Defendants shall have to and including December 12, 1969 within which to file and personally serve their reply to such additional papers.

DATED: October 16, 1969.

WILLIAM P. GRAY,
William P. Gray,
United States District Judge.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA.

HONORABLE WILLIAM P. GRAY, *Judge Presiding.*

CIVIL ACTION No. 69-931=WPG.

NORTHERN ACCEPTANCE TRUST 1065, ET AL.
Plaintiffs,

v.

AMFAC, INC., ET AL.,
Defendants.

FINDINGS OF THE COURT DATED DECEMBER 15, 1969.

THE COURT: Well, this has been, frankly, a very close case, and I did not listen idly to the arguments today. Both of you have briefed it very thoroughly, and I start out with the proposition that this case was properly filed here and must remain here, unless there is a strong preponderance of factors that indicate it should be moved.

Now, the factors in favor of its staying here include this is the plaintiffs' choice of forum, and I have already acknowledged that I put a substantial amount of credence in that. The plaintiff should have a right to sue here AMFAC which is doing business here. Also the two plaintiffs live here, and I have no doubt but what they will testify, and they have a right to testify, and their convenience in being able to testify on their home ground is some consideration.

On the other hand, AMFAC, it would be inconvenient for AMFAC's president and employees and directors to be over here, but that is overcome in this Court's judgment by the fact that if they elect to do business in California,

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why, then, they must necessarily be willing, or at least they can't be heard to say, "It would be inconvenient for us to be sued here." They can accept the obligations of doing business here as well as the benefits.

And to a lesser extent, the same is true with respect to AMFAC's witnesses. If AMFAC wants to produce witnesses where they are sued, why, let them bring them over here. So AMFAC's inconvenience does no more than put in equipoise the inconvenience of the plaintiffs, and since the plaintiff is entitled to its choice of forum, why, I think as far as convenience or inconvenience of employee witnesses is concerned, I think the plaintiff has the edge.

It is also noteworthy that at least a part of the transactions occurred here. I don't put undue credence in the fact that it happened that the board of directors meeting was in Silverado that decided to take on these three corporations, and I don't put undue credence in the fact that the Capital Studies Committee, or whatever it was, meeting was here. But suffice it to say that a part of the transaction was here, and that indicates that much more clearly that AMFAC finds it convenient to come over here on many occasions to participate in business.

So a lot of factors, in addition to simply the presumption in favor of leaving a case where it was filed, come into play. But there are factors on the other side.

I am not worried about AMFAC's officers and employees, as I have mentioned. But I am concerned about individual defendants who are not employees of AMFAC or members of the board of directors of AMFAC who have been sued and against whom it has been contended that they participated in the conspiracy. I have to consider their convenience or lack of convenience.

And then I am also concerned about non-party witnesses. It may be appropriate to hire appraisers. I can't judge that now, but I can judge the fact that the land is in Hawaii, and that the value of the land may at one time

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or another, in one manner or another, become an issue, and to that extent I can't say that the only people who could be relevant appraisers are those here in California. And also I can't avoid the possibility that the Court may want to take a view of the land. I don't judge those things now. I don't speculate on it. But one of the factors is that the land concerned is in the Hawaiian Islands, and that is a plus as far as transferring the thing to Hawaii is concerned.

With respect to records I have already commented. I don't mind imposing upon AMFAC the cost of lugging records over here in an area where they do as much business as they do. But, on the other hand, the location of records is a factor that would indicate the trial ought to be where the general reservoir of records is. I have had many cases where there was thorough discovery, but when we come down to it there is one more document that ought to be presented and the witness is asked to present it, and he agrees to do so, and if he can go home at noon and get it, it is that much easier as far as the progress of the case is concerned.

I also have to be concerned about the Court's calendar. The interest of justice has an element in it of keeping the burden reasonably spread out, and also, if it would take this Court longer in elapsed time, even if this case could be tried in two weeks, the fact that this Court couldn't devote a sustained two weeks but probably it would extend out to as much as four, as compared with the less congested calendar in the Islands, I have to take that into consideration, as well as this matter of expense to all parties concerned, not to speak of the comparative wear and tear on the Court and its case load.

And then I have to be concerned to some extent about the fact that this is purported to be a class action, and it would seem to be reasonable to anticipate that it is going to be a class action, and one of the rights of prospective

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members of plaintiff's class is the right to come in, and I ought to give some consideration to the convenience of those who might decide they want to come in, and I don't have to apologize for that because there wouldn't be any provision for class actions if you could assume out of hand that no people would be disposed to take advantage of it.

All of those considerations have given the Court a lot of trouble, but largely because of the last factor that I have mentioned, and the location of the land, and the non-party witnesses, and the parties who are not employees, officers or directors of AMFAC, and after drawing a breath, the relative calendars of the Court, have caused the Court to conclude that the defendants have sustained the burden, and that all-in-all the comparative factors that I have mentioned and the interests of justice indicate that this case must be transferred and I will so do under that section, whatever it is, something-something (a).

The defendants will prepare the appropriate order.

(Whereupon, as hereinbefore indicated the cause of the foregoing action was transferred to Hawaii.)

CERTIFICATE.

I, JOHN S. MURDOCK, hereby certify that I am a duly appointed, qualified and acting official court reporter for the United States District Court Central District of California.

I further certify that the foregoing 7 pages are a full, true and correct transcription of the findings of the Court in the foregoing cause on Monday, December 15, 1969.

Dated at Los Angeles, California, this 16th day of December, 1969.

JOHN S. MURDOCK,
John S. Murdock,
Official Reporter.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA.

No. 69-931 WPG.

NORTHERN ACCEPTANCE TRUST 1065, ET AL.,
Plaintiffs,

v.

AMFAC, INC., ET AL.,
Defendants.

ORDER GRANTING MOTION FOR CHANGE OF VENUE FILED DECEMBER 16, 1969.

The continued hearing on the motion for change of venue of certain moving defendants came on regularly for hearing in Courtroom No. 6 of the above-entitled Court, the Honorable William P. Gray, Judge presiding, on December 15, 1969. Moving defendants appeared by their attorneys of record Messrs. Cades Cox Schutte Fleming & Wright by Douglas E. Prior, Esquire and Messrs. Adams, Duque & Hazeltine by Lawrence T. Lydick, Esquire and Bruce A. Beckman, Esquire. Moving defendant Haskins & Sells appeared by its attorneys of record Messrs. Loeb and Loeb by Alfred I. Rothman, Esquire. Defendant Dean Witter & Co., Incorporated appeared by its attorneys of record Messrs. O'Melveny & Myers by Rodney K. Potter, Esquire and Thomas Ready, Esquire. Plaintiffs appeared by their attorneys of record Messrs. Dilworth, Paxson, Kalish, Kohn & Levy by Bruce W. Kauffman, Esquire and David Pittinsky, Esquire and Alexander Kahan, Esquire and Kenneth P. Kimmel, Esquire. Memoranda of law and affidavits having been filed on behalf of the respective parties, and vari-

ous depositions, answers and further answers to Plaintiffs' Interrogatories—Change of Venue, and Response of Defendant Amfac, Inc. to Plaintiffs' First Request for Admissions—Change of Venue having been filed, the matter having been argued and submitted to the Court for its consideration, the Court having duly considered the same, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. That the motion for change of venue of moving defendants filed herein on August 12, 1969 is granted, and this action is hereby ordered transferred from the United States District Court for the Central District of California to the United States District Court for the District of Hawaii.

2. That the Clerk of the United States District Court for the Central District of California is hereby directed to transfer all records and papers in this action to the Clerk of the United States District Court for the District of Hawaii, together with a certified copy of this order.

DATED: December 16, 1969.

WILLIAM P. GRAY,
United States District Judge.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 25206.

NORTHERN ACCEPTANCE TRUST 1065 BY C. JON HANDY, TRUSTEE, AND DERICKSEN M. BRINKERHOFF,

Petitioners,

v.

HONORABLE WILLIAM P. GRAY, UNITED STATES DISTRICT JUDGE CENTRAL DISTRICT OF CALIFORNIA, AND AMFAC, INC., THE LIHUE PLANTATION CO., LTD., PUNA SUGAR CO., LTD., KEKAHA SUGAR CO., LTD., THE LIHUE PLANTATION CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., PUNA SUGAR CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., KEKAHA SUGAR CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., WAIMEA SUGAR CO., LTD., H. A. WALKER, JR., K. H. BERG, J. RUSSELL CADES, H. C. EICHELBERGER, C. HUTTON SMITH, J. E. EDNIE, R. A. VAN ORSDEL, JR., M. A. PIETSCHMAN, THOMAS BOWMAN, WILLIAM K. DONNELLY, J. E. LOOMIS, W. A. KRUSE, W. J. BALDWIN, D. T. SILVER, WILLIAM H. BOMKE, H. LESLIE HOFFMAN, RALPH E. PHILLIPS, FRED H. MERRILL, KENNETH F. BROWN, LEROY C. BUSH, GILBERT E. COX, C. DAGGETT HARVEY, JOHN C. WALKER, RALPH T. YAMAGUCHI, S. W. WILCOX, F. W. BROADBENT, G. W. FISHER, SR.,

JOHN PATTERSON, HERBERT C. SHIPMAN, L. A. FAYE, JO L. FULLER, R. GREGG ANDERSON, DEAN WITTER & CO., INC., HASKINS & SELLS AND FIREMAN'S FUND INSURANCE CO.,

Respondents.

ORDER FILED DECEMBER 31, 1969.

Before: HAMLEY, MERRILL and DUNIWAY, *Circuit Judges.*

On or before January 23, 1970, petitioners shall file the record necessary to be considered in passing upon the petition for a writ of mandamus, together with their opening brief unless they wish their petition for writ of mandamus to be regarded as their opening brief. On or before twenty days after the serving and filing of the record and opening brief, respondent judge may, and all other respondents shall, serve and file an answer to the petition, together with a supporting brief. On or before ten days after the serving and filing of the answer, petitioners may file a reply brief.

After the reply brief has been filed, or the time for filing such brief has expired, the Clerk shall calendar the cause for oral argument in Los Angeles, before any panel, unless all parties request that the cause be submitted without oral argument.

FREDERICK G. HAMLEY,
CHARLES M. MERRILL,
BEN G. DUNIWAY,
United States Circuit Judges.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 25206.

NORTHERN ACCEPTANCE TRUST 1065 BY C. JON HANDY, TRUSTEE, AND DERICKSEN M. BRINKERHOFF,

Petitioners,

v.

HONORABLE WILLIAM P. GRAY, UNITED STATES DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA, AND AMFAC, INC., THE LIHUE PLANTATION CO., LTD., PUNA SUGAR CO., LTD., KEKAHA SUGAR CO., LTD., THE LIHUE PLANTATION CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., PUNA SUGAR CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., KEKAHA SUGAR CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., WAIMEA SUGAR CO., LTD., H. A. WALKER, JR., K. H. BERG, J. RUSSELL CADES, H. C. EICHELBERGER, C. HUTTON SMITH, J. E. EDNIE, R. A. VAN ORSDEL, JR., M. A. PIETSCHMAN, THOMAS BOWMAN, WILLIAM K. DONNELLY, J. E. LOOMIS, W. A. KRUSE, W. J. BALDWIN, D. T. SILVER, WILLIAM H. BOMKE, H. LESLIE HOFFMAN, RALPH E. PHILLIPS, FRED H. MERRILL, KENNETH F. BROWN, LEROY C. BUSH, GILBERT E. COX, C. DAGGETT HARVEY, JOHN C. WALKER, RALPH T. YAMAGUCHI, S. W. WILCOX, F. W. BROADBENT, G. W. FISHER, SR.,

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JOHN PATTERSON, HERBERT C. SHIPMAN, L. A. FAYE, JO L. FULLER, R. GREGG ANDERSON, DEAN WITTER & CO., INC., HASKINS & SELLS AND FIREMAN'S FUND INSURANCE CO.,

Respondents.

ORDER DATED FEBRUARY 9, 1970.

Addendum B should do no harm. As to it, order of January 28, 1970 will stand.

As to Addendum A, by separate document petitioner will supply missing parts of Sept. 8, 1969 and December 15, 1969 proceedings.

As to Addendum "C", respondents may reply to it, and if so advised, supply their own counter addendum.

RICHARD H. CHAMBERS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 25206.

NORTHERN ACCEPTANCE TRUST 1065 BY C. JON HANDY, TRUSTEE, AND DERICKSEN M. BRINKERHOFF,

Petitioners,

v.

HONORABLE WILLIAM P. GRAY, UNITED STATES DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA, AND AMFAC, INC., THE LIHUE PLANTATION CO., LTD., PUNA SUGAR CO., LTD., KEKAHA SUGAR CO., LTD., THE LIHUE PLANTATION CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., PUNA SUGAR CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., KEKAHA SUGAR CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., WAIMEA SUGAR CO., LTD., H. A. WALKER, JR., K. H. BERG, J. RUSSELL CADES, H. C. EICHELBERGER, C. HUTTON SMITH, J. E. EDNIE, R. A. VAN ORSDEL, JR., M. A. PIETSCHMAN, THOMAS BOWMAN, WILLIAM K. DONNELLY, J. E. LOOMIS, W. A. KRUSE, W. J. BALDWIN, D. T. SILVER, WILLIAM H. BOMKE, H. LESLIE HOFFMAN, RALPH E. PHILLIPS, FRED H. MERRILL, KENNETH F. BROWN, LEROY C. BUSH, GILBERT E. COX, C. DAGGETT HARVEY, JOHN C. WALKER, RALPH T. YAMAGUCHI, S. W. WILCOX, F. W. BROADBENT, G. W. FISHER, SR.,

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JOHN PATTERSON, HERBERT C. SHIPMAN, L. A. FAYE, JO L. FULLER, R. GREGG ANDERSON, DEAN WITTER & CO., INC., HASKINS & SELLS AND FIREMAN'S FUND INSURANCE CO.,

Respondents.

On Petition for Writ of Mandamaus from the Order of the United States District Court for the Central District of California

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OPINION DATED MARCH 23, 1970.

Before: HAMLEY, MERRILL and WRIGHT, *Circuit Judges*

MERRILL, *Circuit Judge*:

Petitioners seek to have us set aside by writ of mandamus an order for change of venue issued by the District Court.

Petitioners brought suit in the Central District of California for alleged violations of the Securities Act of 1933 and the Securities Exchange Act of 1934, and for alleged fraud and breach of fiduciary duties. At issue is the acquisition by the principal defendant, Amfac, Inc., a Hawaiian corporation, of three Hawaiian sugar plantation companies. The three plantation companies and many individuals connected with them and with Amfac were also named as defendants. Petitioners challenge the proxy statements issued by the plantation companies and appraisals made of their assets—essentially their plantation properties. Their suit is characterized as derivative on behalf of the plantation companies and as a class action on behalf of all shareholders of those companies.

Defendants moved for a change of venue to the District of Hawaii under 28 U. S. C. § 1404(a).[1] Change of venue was ordered.

Petitioners now seek in this court a writ of mandamus directing retransfer of the suit to the Central District of California. The threshold question is whether mandamus is available for review of the District Court order. In support of issuance of the writ petitioners rely on *Pacific Car and Foundry Company v. Pence,* 403 F. 2d 949 (9th Cir. 1968).

In that case we were faced with what we regarded as clear error through what amounted to a failure by the District Court to give due consideration to factors relevant to a motion for change of venue under § 1404(a).[2] As this court has observed elsewhere, "* * * [W]e can—and must—prevent injustice by demanding that trial judges respect the standards of the statute." *Kasey v. Molybdenum Corporation of America,* 408 F. 2d 16, 20 (9th Cir. 1969).

In *Pacific Car and Foundry* we did not order a change of venue. The writ directed the District Court to vacate its order and entertain petitioner's motion anew, at which time due consideration of the relevant factors might be had. 403 F. 2d at 955.

The situation now before us is quite different. It is clear from the decision of the court rendered from the bench that all relevant factors were carefully considered and weighed, including the giving of substantial weight to peti-

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1. § 1404(a):

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

2. In that case we noted that "no contacts of any substance with the State of Hawaii exist as to either party." 403 F. 2d at 955. Plaintiff made no showing that the choice of Hawaii would serve its own convenience. The choice "was supported only by the fact that it was chosen." 403 F. 2d at 955.

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tioners' choice of forum.[3] Review of the court's order would thus entail a *de novo* balancing by this court of the competing factors bearing upon convenience and the interests of justice. Mandamus does not and should not issue for such a review. As stated in *Kasey v. Molybdenum Corporation of America, supra,* 408 F. 2d at 20:

> "We decline to issue the writ when it appears from a well reasoned holding by the trial judge that he has considered the issues listed in 1404(a) and has made his decision accordingly. It is not our function to substitute our judgment for that of the judge most familiar with the problem."

The petition for a writ of mandamus is denied.

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3. It appears from the District Court's oral findings, and the trial briefs, that the following factors were balanced:

For Central California: It was plaintiffs' choice and plaintiffs' residence. Amfac had substantial business contacts there. Many third-party witnesses reside in California. Some of the meetings of Amfac's board of directors and Capital Study Committee leading to the mergers were held in California (Northern, not Central, District). The appraisal on which Amfac acted was prepared for Amfac by Dean Witter & Co., in its Los Angeles office.

For Hawaii: The operative facts respecting violations of the 1933 and 1934 acts, fraud and breach of fiduciary duties, occurred in Hawaii, where the proxy statements were prepared and disseminated. Assets (principally land) of the companies, the value of whose stock is in issue, are in Hawaii. The land is there available for view. The plantation companies for whom the petitioners act in a derivative capacity have no contact of any substance with California. Seventy-five per cent of the stockholders of those companies (the "class" petitioners represent) reside in Hawaii, as do the overwhelming majority of individual defendants and a number of important third-party witnesses. Relevant corporation records are kept there. Relative calendar congestion of the courts favors Hawaii.

The District Court was clearly aware that the special venue provisions of the 1933 and 1934 acts dictated that strong weight be given to plaintiffs' choice of forum. These special venue provisions, of course, did not otherwise affect the applicability of § 1404(a). See *Ex Parte Collett,* 337 U. S. 55 (1949); *United States v. National City Lines,* 337 U. S. 78 (1949).

APPENDIX B.

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA.

CIVIL ACTION No. 69-931-WPG.

NORTHERN ACCEPTANCE TRUST 1065 BY C. JON HANDY, TRUSTEE AND DERICKSEN M. BRINKERHOFF, ON BEHALF OF THEMSELVES AND ON BEHALF OF ALL OTHER SHAREHOLDERS OF THE LIHUE PLANTATION CO., LTD., PUNA SUGAR CO., LTD. AND KEKAHA SUGAR CO., LTD., SIMILARLY SITUATED AND, DERIVATIVELY, ON BEHALF OF THE LIHUE PLANTATION CO., LTD., PUNA SUGAR CO., LTD. AND KEKAHA SUGAR CO., LTD.,

Plaintiffs,

v.

AMFAC, INC., THE LIHUE PLANTATION CO., LTD., PUNA SUGAR CO., LTD., KEKAHA SUGAR CO., LTD., THE LIHUE PLANTATION CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., PUNA SUGAR CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., KEKAHA SUGAR CO., LTD., A WHOLLY-OWNED SUBSIDIARY OF AMFAC, INC., WAIMEA SUGAR CO., LTD., H. A. WALKER, JR., K. H. BERG, J. RUSSELL CADES, H. C. EICHELBERGER, C. HUTTON SMITH, J. E. EDNIE, R. A. VAN ORSDEL, JR., M. A. PIETSCHMAN, THOMAS BOWMAN, WILLIAM K. DONNELLY, J. E. LOOMIS, W. A. KRUSE, W. J. BALDWIN, D. T. SILVER, WILLIAM H. BOMKE, H. LESLIE HOFFMAN,

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Defendants.

Jury Trial Demanded

COMPLAINT FILED MAY 14, 1969.

COUNT ONE.

1. Count One of this action is instituted under Section 27 of the Securities Exchange Act of 1934, as amended (15 USC 78aa) ("1934 Act") and under Section 22 of the Securities Act of 1933, as amended (15 USC 77v) ("1933 Act") for equitable relief and to recover damages and the costs of suit, including reasonable attorneys' fees, against defendants for the injuries sustained by plaintiffs and members of the classes represented by them and, derivatively, for the injuries sustained by defendants, The Lihue Plantation Co., Ltd. ("Former Lihue"), Puna Sugar Co., Ltd. ("Former Puna") and Kekaha Sugar Co., Ltd. ("Former Kekaha"), by reason of defendants' violations as hereinafter alleged of Section 10(b) of the 1934 Act (15 USC 78j) and Rule 10b-5 (17 CFR 240.10b-5) adopted thereunder and Section 17(a) of the 1933 Act (15 USC 77q).

A. *Parties.*

2. (a) Plaintiff Northern Acceptance Trust 1065, a trust duly established under the laws of the State of California, has its principal office at 1100 Glendon Avenue, Suite

916, Los Angeles, California, and brings this action by its Trustee, C. Jon Handy. Plaintiff Dericksen M. Brinkerhoff, an individual, resides at 4985 Chicago Avenue, Riverside, California.

(b) At all times material to the Complaint, Northern Acceptance Trust 1065 was a shareholder of defendants Former Lihue, Former Puna and Former Kekaha and Dericksen M. Brinkerhoff was a shareholder of Former Lihue.

(c) As of October 31, 1968, Northern Acceptance Trust 1065 owned 120 shares of Former Lihue, 45 shares of Former Puna and 10 shares of Former Kekaha, and Dericksen M. Brinkerhoff owned 83 shares of Former Lihue.

3. Plaintiffs are representative of three classes as defined by Rule 23 of the Federal Rules of Civil Procedure and bring this action on behalf of themselves and the three entire classes of which they are representative.

4. The three representative classes consist of:

(a) All shareholders of the common stock of defendant Former Lihue other than defendant Amfac, Inc. ("Amfac");

(b) All shareholders of the common stock of defendant Former Puna other than Amfac; and

(c) All shareholders of the common stock of defendant Former Kekaha other than Amfac and defendant Waimea Sugar Co., Ltd. ("Waimea").

5. Each class is so numerous and geographically so widely distributed that joinder of all members is impracticable. There are questions of law and fact common to each class. The claims of the representative plaintiffs are typical of the claims of each class and plaintiffs will fairly and adequately protect the interests of each class.

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6. The prosecution of separate actions by individual members of each class would create the risk of:

(a) Inconsistent or varying adjudications in different jurisdictions with respect to individual members of each class which would establish incompatible standards of conduct for the parties opposing each class; and

(b) Adjudications with respect to individual members of each class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

7. The questions of law and fact, which are common to all three classes and to the members thereof, predominate over any questions affecting only individual members.

8. Each class action is superior to other available methods for the fair and efficient adjudication of the controversy.

9. Plaintiffs also bring this action derivatively on behalf of Former Lihue, Former Puna and Former Kekaha.

10. Each derivative action is not a collusive one to confer jurisdiction on a Court of the United States which it would not have otherwise.

11. Demand by plaintiffs that Former Lihue, Former Puna and Former Kekaha bring this action would have been futile and, therefore, was not made.

12. Defendant Amfac is a corporation organized under the laws of the State of Hawaii with its principal place of business at 745 Fort Street, Honolulu, Hawaii.

13. Defendant Former Lihue was a corporation, organized under the laws of the State of Hawaii with its principal place of business at 745 Fort Street, Honolulu, Hawaii, until on or about December 31, 1968.

14. Defendant Former Puna was a corporation, organized under the laws of the State of Hawaii with its principal place of business at 745 Fort Street, Honolulu, Hawaii, until on or about December 31, 1968.

15. Defendant Former Kekaha was a corporation, organized under the laws of the State of Hawaii with its principal place of business at 745 Fort Street, Honolulu, Hawaii, until on or about December 31, 1968.

16. Defendant The Lihue Plantation Co., Ltd. ("New Lihue"), a wholly-owned subsidiary of Amfac, is organized under the laws of the State of Hawaii as the successor corporation to Former Lihue with its principal place of business at 745 Fort Street, Honolulu, Hawaii.

17. Defendant Puna Sugar Co., Ltd. ("New Puna"), a wholly-owned subsidiary of Amfac, is organized under the laws of the State of Hawaii as the successor corporation to Former Puna with its principal place of business at 745 Fort Street, Honolulu, Hawaii.

18. Defendant Kekaha Sugar Co., Ltd. ("New Kekaha"), a wholly-owned subsidiary of Amfac, is organized under the laws of the State of Hawaii as the successor corporation to Former Kekaha with its principal place of business at 745 Fort Street, Honolulu, Hawaii.

19. Defendant Waimea was a corporation organized under the laws of the State of Hawaii with a principal place of business in the town of Waimea, Kauai, Hawaii. On or about February 4, 1969, Waimea was merged into New Kekaha.

20. At all times material to the Complaint, the following defendants were contemporaneously directors of Former Lihue, Former Puna and Former Kekaha, and each

is sued individually, as a co-conspirator and as an interlocking, self-dealing director:

H. A. Walker, Jr. ("Walker, Jr.")
K. H. Berg ("Berg")
J. Russell Cades ("Cades")
H. C. Eichelberger ("Eichelberger")
C. Hutton Smith ("Smith")

In addition, Walker, Jr. and Smith are sued as interlocking, self-dealing directors of Amfac; Cades is sued as a senior partner of Smith, Wild, Beebe & Cades, counsel for Amfac, Former Lihue, Former Puna and Former Kekaha and as a partner of defendant Gilbert E. Cox, director of Amfac; Berg is sued as an officer of Amfac; and Eichelberger is sued as an interlocking, self-dealing director of Amfac and a deputy of Waimea.

21. At all times material to the Complaint, the following defendants were officers of Former Lihue, Former Puna, Former Kekaha and Amfac and each is sued individually, as a co-conspirator and as an interlocking, self-dealing officer:

J. E. Ednie
R. A. Van Orsdel, Jr.
M. A. Pietschman
Thomas Bowman
William K. Donnelly
J. E. Loomis
W. A. Kruse
W. J. Baldwin
D. T. Silver
William H. Bomke

22. (a) At all times material to the Complaint, the following defendants were directors of Amfac, and each is

sued individually, as a co-conspirator and as a director of Amfac:

H. Leslie Hoffman ("Hoffman")
Ralph E. Phillips ("Phillips")
Fred H. Merrill ("Merrill")
Kenneth F. Brown ("Brown")
LeRoy C. Bush ("Bush")
Gilbert E. Cox ("Cox")
C. Daggett Harvey ("Harvey")
John C. Walker ("Walker")
Ralph T. Yamaguchi ("Yamaguchi")

In addition, Phillips is sued as a senior vice-president and as a deputy of defendant Dean Witter & Co., Inc. ("Dean Witter"); Merrill is sued as chairman of the board and as a deputy of defendant American Express Investment Management Co. ("American"); and Cox is sued as a partner of Smith, Wild, Beebe & Cades, counsel for Amfac, Former Lihue, Former Puna and Former Kekaha, and as a partner of Cades, director of Former Lihue, Former Puna and Former Kekaha.

(b) At all times material to the Complaint, R. Gregg Anderson was an officer of Amfac, and he is sued individually, as a co-conspirator and as an officer of Amfac.

23. At all times material to the Complaint, the following defendants were:

(a) directors of Former Lihue:

S. W. Wilcox ("Wilcox")
F. W. Broadbent
G. W. Fisher, Sr.

(b) directors of Former Puna:

John Patterson
Herbert C. Shipman

(c) directors of Former Kekaha:

L. A. Faye ("Faye")
Wilcox

Each of these defendants is sued individually and as a co-conspirator. In addition, Wilcox is sued as an interlocking, self-dealing director of Former Lihue and Former Kekaha and Faye is sued as a deputy of Waimea.

24. Defendant Dean Witter is a corporation organized under the laws of the State of Delaware with a principal place of business at 632 South Spring Street, Los Angeles, California. It is a member firm of the New York Stock Exchange, Pacific Stock Exchange and Honolulu Stock Exchange. Defendant Jo L. Fuller is an officer of Dean Witter and he is sued individually, as a co-conspirator and as an officer of Dean Witter.

25. Defendant Haskins & Sells ("Haskins") is a partnership organized under the laws of the State of California with a principal place of business at 1 Wilshire Building, Suite 1900, Los Angeles, California. It is a national accounting firm, which is sued as a partnership comprised of its partner members and as the auditor for Former Lihue, Former Puna and Former Kekaha as well as Amfac and Dean Witter.

26. Defendant American is a corporation organized under the laws of the State of New York with a principal place of business at 550 Laurel Street, San Francisco, California. It is a national financial service and mutual fund manager enterprise.

27. All corporate and partnership defendants are sued individually and as co-conspirators herein.

28. At all times material to the Complaint, individual defendants Walker, Jr., Berg, Cades, Eichelberger, Smith,

Hoffman, Phillips, Merrill, Brown, Bush, Cox, Harvey, Walker, Yamaguchi and corporate defendants American and Dean Witter owned or controlled beneficially, directly or indirectly, substantial shares of Amfac common stock.

29. With the exception of Former Lihue, Former Puna and Former Kekaha, "defendant" as used herein includes each of the above-named defendants and any predecessors in interest thereto.

B. *Jurisdiction.*

30. (a) In connection with the acts, conduct, combination and conspiracy alleged herein, acts and transactions constituting the violations occurred in the Central District of California.

(b) Each defendant is an inhabitant of or is found in or transacts business in the Central District of California.

C. *The Course of Action.*

31. At all times material to the Complaint, Amfac and its director and officer defendants dominated and controlled the personnel, decisions, policies, and boards of directors of Former Lihue, Former Puna, and Former Kekaha.

32. Beginning at least as early as July 25, 1968, the exact date being unknown to plaintiffs, and continuing as hereinafter alleged, all of the defendants engaged in a combination and conspiracy ("Scheme") to acquire sole ownership and control of Former Lihue, Former Puna and Former Kekaha and their assets on a basis unfair, inequitable and detrimental to, and at the expense of, plaintiffs, the members of the three classes represented by plaintiffs and Former Lihue, Former Puna and Former Kekaha

in violation of Section 10(b) of the 1934 Act and Rule 10b-5 and Section 17(a) of the 1933 Act.

33. The aforesaid Scheme consisted of a continuing agreement, understanding and conspiracy among the defendants, the substantial terms of which were:

(a) To eliminate all non-Amfac shareholders of Former Lihue, Former Puna, and Former Kekaha.

(b) To transfer all assets of Former Lihue, Former Puna and Former Kekaha to New Lihue, New Puna and New Kekaha as wholly-owned subsidiaries of Amfac, thereby destroying the separate corporate existence of Former Lihue, Former Puna and Former Kekaha.

(c) To give Amfac sole ownership and control of the assets of Former Lihue, Former Puna and Former Kekaha.

(d) To accomplish (a), (b) and (c) on a basis unfair, inequitable and detrimental to, and at the expense of, plaintiffs and the members of the three classes represented by plaintiffs.

(e) To accomplish (a), (b) and (c) on a basis unfair, inequitable and detrimental to, and at the expense of, Former Lihue, Former Puna and Former Kekaha.

34. For the purpose of effectuating the Scheme, defendants, *inter alia*, committed the following acts:

(a) On or about July 25, 1968, the boards of directors of Former Lihue, Former Puna and Former Kekaha, while under domination and control of Amfac and its directors and officers, adopted plans of reorganization and merger which would give Amfac sole ownership and control of the assets of Former Lihue, Former Puna and Former Kekaha. In addition, said boards of directors also

publicly announced that they would recommend the approval of said plans of reorganization and merger to the shareholders of Former Lihue, Former Puna and Former Kekaha.

(b) On or about September 23, 1968, defendants participated in the preparation and mailing of Proxy Statements ("Proxies") to each of the shareholders of Former Lihue, Former Puna and Former Kekaha. In said Proxies, defendants proposed to exchange the following Amfac securities, registered, or to be registered prior to issuance, pursuant to Section 12 of the 1934 Act (15 USC 781):

(i) 1.2 shares of pre-split common stock for each share of Former Lihue;

(ii) 0.5 share of pre-split common stock for each share of Former Puna; and

(iii) 1 share of preferred stock for each share of Former Kekaha.

(c) On or about November 1, 1968, defendants participated in the preparation and mailing of a letter of justification recommending the plans of reorganization and merger to each of the shareholders of Former Lihue, Former Puna and Former Kekaha.

(d) Beginning at least as early as July 25, 1968, defendants engaged in other acts and transactions for the purpose of obtaining sole control and ownership of the assets of Former Lihue, Former Puna and Former Kekaha with a minimum of dissent, disclosure and friction and with as large a vote of approval as possible by all non-Amfac shareholders.

35. In furtherance of the Scheme, defendants have participated in the preparation and mailing of the Proxies

and other announcements, releases and statements ("Proxies and other statements") which are in violation of Section 10 (b) of the 1934 Act, Rule 10b-5 promulgated thereunder and Section 17(a) of the 1933 Act, in that they make untrue statements of material facts and omit to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, with respect to the acquisition of sole control and ownership of the assets of Former Lihue, Former Puna and Former Kekaha and the approval of the plans of reorganization and merger by the boards of directors of Amfac, Former Lihue, Former Puna and Former Kekaha pursuant to the Scheme, *inter alia,* as follows:

(a) The Proxies and other statements falsely represented and substantially undervalued the real estate and other assets held by Former Lihue, Former Puna and Former Kekaha.

(b) The Proxies and other statements falsely represented that the plans of reorganization and merger and the exchange ratios contained therein would be fair and equitable to, and in the best interest of, all shareholders of Former Lihue, Former Puna and Former Kekaha.

(c) The Proxies and other statements failed to disclose that the plans of reorganization and merger, and the exchange ratios contained therein, were solely in the interests of Amfac, the individual director and officer defendants and the corporate and partnership defendants.

(d) The Proxies and other statements failed to disclose that the actual values of the securities which plaintiffs and the members of the three classes represented by plaintiffs were called upon to exchange were substantially greater than either the actual values or the represented values of the Amfac securities exchanged therefor.

(e) The Proxies and other statements failed to disclose the details, circumstances, purposes, consequences and effects relating to and resulting from the agreement between Eagle County Development Corporation and Former Lihue for the purchase of approximately 11,000 acres of land owned by Former Lihue.

(f) The Proxies and other statements failed to disclose, the details, circumstances, purposes, consequences, and effects relating to and resulting from the planned merger of Waimea into New Kekaha as a result of which Waimea received 12,900 shares of Amfac preferred stock in addition to what it otherwise was entitled to receive as a shareholder of Former Kekaha.

(g) The Proxies and other statements failed to disclose that Amfac and its directors and officers dominated and controlled the boards of directors of Former Lihue, Former Puna and Former Kekaha when said latter boards of directors:

(i) concluded that the plans of reorganization and merger were advisable; and

(ii) recommended the adoption of the plans of reorganization and merged by all shareholders of Former Lihue, Former Puna and Former Kekaha.

(h) The Proxies and other statements failed to disclose that Amfac had "working control" of Former Lihue, Former Puna and Former Kekaha at the time of the acts set forth in subparagraph 35(g)(i) and (ii), *supra.*

(i) The Proxies and other statements failed to disclose that the officers of Former Lihue, Former Puna and Former Kekaha were virtually identical in composition to the officers of Amfac at the time of the acts set forth in subparagraph 35(g)(i) and (ii), *supra.*

(j) The comparative data between the common stock of Former Lihue, Former Puna and Former Kekaha and the common stock of Amfac contained in the Proxies and other statements were false and misleading.

(k) The comparative data between the assets held by Former Lihue, Former Puna and Former Kekaha and the assets held by Amfac contained in the Proxies and other statements were false and misleading.

(l) The Proxies and other statements failed to disclose the details, circumstances, purposes, consequences, and effects relating to and resulting from the acquisition of a 50% interest in Kauai Sugar Storage Corporation by Former Lihue in or about February 1967.

(m) The Proxies and other statements failed to disclose the details, circumstances, purposes, consequences, and effects relating to and resulting from the sale of Former Lihue's 49.97% interest in Kauai Electric Co., Ltd.

(n) The Proxies and other statements failed to disclose the details, circumstances, purposes, consequences, and effects relating to and resulting from the approval of the plans of reorganization and merged by the boards of directors of Former Lihue, Former Puna, Former Kekaha and Amfac.

(o) The Proxies and other statements falsely represented that Dean Witter had made an independent investigation and review of the plans of reorganization and merger.

(p) The Proxies and other statements failed to disclose that Phillips, a senior member of the board of directors of Amfac, was a then senior partner of Dean Witter.

(q) The Proxies and other statements failed to disclose that the fee for the so-called independent investi-

gation and review of the plans of reorganization and merger by Dean Witter was paid by Amfac.

(r) The Proxies and other statements falsely represented that the Proxies were cleared through or approved by the Securities and Exchange Commission prior to mailing to all shareholders of Former Lihue, Former Puna and Former Kekaha.

(s) The Proxies and other statements failed to disclose the details, circumstances, purposes, consequences and effects relating to and resulting from the gradual acquisition of stock of Former Lihue, Former Puna and Former Kekaha by Amfac, the exact dates being unknown to plaintiffs.

36. But for the Scheme and the materially false and misleading statements and omissions contained in the Proxies and other statements, the plans of reorganization and merger never would have been consummated. As a result of the Scheme and reliance upon the Proxies and other statements and the materially false and misleading statements and omissions contained therein, said plans of reorganization and merger were approved with a minimum of dissent. Thus, the approvals of the plans of reorganization and merger were invalid.

37. All of the defendants, having knowledge of the aforesaid Scheme, have acquiesced, encouraged, cooperated and assisted in the effectuation thereof.

38. Various other corporations, individuals and entities who are not defendants herein, their identity being presently unknown to plaintiffs, participated and are participating as co-conspirators in the aforesaid Scheme and performed acts in furtherance thereof.

39. In connection with and in furtherance of the aforesaid Scheme, defendants, directly and indirectly, by use of

the means and instrumentalities of interstate commerce and of the mails, engaged in acts, practices, courses of business and manipulative and deceptive devices and contrivances, all constituting and operating as a fraud and deceit upon plaintiffs, the members of the three classes represented by plaintiffs, and Former Lihue, Former Puna and Former Kekaha in violation of Section 10(b) of the 1934 Act, Rule 10b-5 and Section 17(a) of the 1933 Act.

40. In connection with and in furtherance of the aforesaid Scheme, defendants, directly and indirectly, used the means and instrumentalities of interstate commerce and of the mails and the facilities of national securities exchanges.

41. By reason of the aforesaid Scheme, plaintiffs and each member of the three classes represented by plaintiffs have been substantially injured and damaged by defendants in an amount which is presently undetermined.

42. By reason of the aforesaid Scheme, Former Lihue, Former Puna and Former Kekaha have been substantially injured and damaged by defendants in an amount which is presently undetermined.

WHEREFORE, plaintiffs demand:

1. (a) Judgment in their favor and in favor of each member of the three classes represented by them rescinding the exchange of their shares of common stock in The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd., by rescinding the plans of reorganization and merger of said corporations with Amfac, Inc. and placing them in their respective positions prior thereto, together with the costs of suit, including reasonable attorneys' fees; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd., and Kekaha

Sugar Co., Ltd., rescinding the plans of reorganization and merger of said corporations with Amfac, Inc. and placing them in their respective positions prior thereto, together with the costs of suit, including reasonable attorneys' fees.

2. (a) Judgment in their favor and in favor of each member of the three classes represented by them in the amount of damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd, and Kekaha Sugar Co., Ltd., in the amount of damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees.

3. (a) Judgment in their favor and in favor of each member of the three classes represented by them requiring an accounting by defendants; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. requiring an accounting by defendants.

4. (a) Judgment in their favor and in favor of each member of the three classes represented by them appointing a receiver to implement the relief prayed for hereunder; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. appointing a receiver to implement the relief prayed for hereunder.

5. (a) Judgment in their favor and in favor of each member of the three classes represented by them awarding punitive damages; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. awarding punitive damages.

6. Such other and further relief as may be necessary and appropriate.

COUNT TWO.

43. Count Two of this action is instituted under Section 27 of the 1934 Act (15 USC 78aa) for equitable relief and to recover damages and the costs of suit, including reasonable attorneys' fees, against defendants for the injuries sustained by plaintiffs and members of the classes represented by them and, derivatively, for the injuries sustained by Former Lihue, Former Puna and Former Kekaha, by reason of defendants' violations as hereinafter alleged of Section 14(a) of the 1934 Act (15 USC 78n) and Rule 14a-9 (17 CFR 240.14a-9) adopted thereunder.

D. *Parties.*

44. Paragraphs 2 through 29 of Count One of this Complaint are incorporated herein by reference.

E. *Jurisdiction.*

45. Paragraph 30 of Count One of this Complaint is incorporated herein by reference.

F. *The Cause of Action.*

46. Paragraph 31 of Count One of this Complaint is incorporated herein by reference.

47. Beginning at least as early as July 25, 1968, the exact date being unknown to plaintiffs, and continuing as hereinafter alleged, all of the defendants engaged in a combination and conspiracy ("Scheme") to acquire sole

ownership and control of Former Lihue, Former Puna and Former Kekaha and their assets on a basis unfair, inequitable and detrimental to, and at the expense of, plaintiffs, the members of the three classes represented by plaintiffs and Former Lihue, Former Puna and Former Kekaha in violation of Section 14(a) of the 1934 Act and Rule 14a-9.

48. Paragraphs 33 and 34 of Count One of this Complaint are incorporated herein by reference.

49. In furtherance of the Scheme, defendants have participated in the preparation and mailing of the Proxies and other announcements, releases and statements ("Proxies and other statements") which are in violation of Section 14(a) of the 1934 Act and Rule 14a-9 in that they make untrue statements of material facts and omit to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, with respect to the acquisition of sole ownership and control of the assets of Former Lihue, Former Puna and Former Kekaha and the approval of the plans of reorganization and merger by the boards of directors of Amfac, Former Lihue, Former Puna and Former Kekaha pursuant to the Scheme, *inter alia,* as follows:

Subparagraphs 35(a) through 35(s) of Count One of this Complaint are incorporated herein by reference.

50. Paragraphs 36 through 38 of Count One of this Complaint are incorporated herein by reference.

51. In connection with and in furtherance of the aforesaid Scheme, defendants, directly and indirectly, by use of the means and instrumentalities of interstate commerce and of the mails, engaged in acts, practices, courses of business and manipulative and deceptive devices and contrivances, all constituting and operating as a fraud and deceit upon plaintiffs, the members of the three classes represented by

plaintiffs, and Former Lihue, Former Puna and Former Kekaha in violation of Section 14(a) of the 1934 Act and Rule 14a-9.

52. Paragraphs 40 through 42 of Count One of this Complaint are incorporated herein by reference.

WHEREFORE, plaintiffs demand:

1. (a) Judgment rescinding the plans of reorganization and merger of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd., and Kekaha Sugar Co., Ltd., with Amfac, Inc. and placing plaintiffs and each member of the three classes represented by them in their respective positions prior thereto, together with the costs of suit, including reasonable attorneys' fees; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. rescinding the plans of reorganization and merger of said corporations with Amfac, Inc. and placing them in their respective positions prior thereto, together with the costs of suit, including reasonable attorneys' fees.

2. (a) Judgment in their favor and in favor of each member of the three classes represented by them in the amount of damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees; and

(b) Derivatively, judgment in favor of defendants, The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd., and Kekaha Sugar Co., Ltd. in the amount of damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees.

3. (a) Judgment in their favor and in favor of each member of the three classes represented by them requiring an accounting by defendants; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. requiring an accounting by defendants.

4. (a) Judgment in their favor and in favor of each member of the three classes represented by them appointing a receiver to implement the relief prayed for hereunder; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. appointing a receiver to implement the relief prayed for hereunder.

5. (a) Judgment in their favor and in favor of each member of the three classes represented by them awarding punitive damages; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. awarding punitive damages.

6. Such other and further relief as may be necessary and appropriate.

COUNT THREE.

53. Count Three of this action is based on this Court's pendent jurisdiction and it is instituted thereunder for equitable relief and to recover damages and the costs of suit, including reasonable attorneys' fees, against defendants for the injuries sustained by plaintiffs and members of the classes represented by them and, derivatively, for the injuries sustained by Former Lihue, Former Puna and Former Kekaha, by reason of defendants' violations as hereinafter alleged of fiduciary duties owed by them to plaintiffs and members of the classes represented by them.

G. Parties.

54. Paragraphs 2 through 29 of Count One of this Complaint are incorporated herein by reference.

H. *Jurisdiction.*

55. Paragraph 53 of this Count Three is incorporated herein by reference.

I. *The Cause of Action.*

56. Paragraphs 31 through 40 of Count One of this Complaint are incorporated herein by reference.

57. The acts and transactions set forth in this Count Three constitute breaches of fiduciary duties owed by defendants to plaintiffs and each member of the three classes represented by plaintiffs and, derivatively, to Former Lihue, Former Puna and Former Kekaha.

58. By reason of the aforesaid breaches of fiduciary duties by defendants, plaintiffs and each member of the three classes represented by plaintiffs have been substantially injured and damaged in an amount which is presently undetermined.

59. By reason of the aforesaid breaches of fiduciary duties by defendants, Former Lihue, Former Puna and Former Kekaha have been substantially injured and damaged in an amount which is presently undetermined.

WHEREFORE, plaintiffs demand:

1. (a) Judgment rescinding the plans of reorganization and merger of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd., and Kekaha Sugar Co., Ltd. with Amfac, Inc. and placing plaintiffs and each member of the three classes represented by them in their respective positions prior thereto, together with the costs of suit, including reasonable attorneys' fees; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. rescinding the plans of reorganization and merger of said corporations with Amfac, Inc. and placing

them in their respective positions prior thereto, together with the costs of suit, including reasonable attorneys' fees.

2. (a) Judgment in their favor and in favor of each member of the three classes represented by them in the amount of damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd., and Kekaha Sugar Co., Ltd. in the amount of damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees.

3. (a) Judgment in their favor and in favor of each member of the three classes represented by them requiring an accounting by defendants; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. requiring an accounting by defendants.

4. (a) Judgment in their favor and in favor of each member of the three classes represented by them appointing a receiver to implement the relief prayed for hereunder; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. appointing a receiver to implement the relief prayed for hereunder.

5. (a) Judgment in their favor and in favor of each member of the three classes represented by them awarding punitive damages; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd., awarding punitive damages.

6. Such other and further relief as may be necessary and appropriate.

COUNT FOUR.

60. Count Four of this action is based on this Court's pendent jurisdiction and it is instituted thereunder for equitable relief and to recover damages and the costs of suit, including reasonable attorneys' fees, against defendants for the injuries sustained by plaintiffs and members of the classes represented by them and, derivatively, for the injuries sustained by Former Lihue, Former Puna and Former Kekaha, by reason of defendants' fraudulent conduct as hereinafter alleged.

J. Parties.

61. Paragraphs 2 through 29 of Count One of this Complaint are incorporated herein by reference.

K. *Jurisdiction.*

62. Paragraph 60 of this Count Four is incorporated herein by reference.

L. *The Cause of Action.*

63. Paragraphs 31 through 40 of Count One of this Complaint are incorporated herein by reference.

64. The acts and transactions set forth in this Count Four constitute violations by defendants of the common law of fraud.

65. By reason of the aforesaid fraudulent conduct by defendants, plaintiffs and each member of the three classes represented by plaintiffs have been substantially injured and damaged in an amount which is presently undetermined.

66. By reason of the aforesaid fraudulent conduct by defendants, Former Lihue, Former Puna and Former Kekaha have been substantially injured and damaged in an amount which is presently undetermined.

WHEREFORE, plaintiffs demand:

1. (a) Judgment rescinding the plans of reorganization and merger of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd., and Kekaha Sugar Co., Ltd. with Amfac, Inc. and placing plaintiffs and each member of the three classes represented by them in their respective positions prior thereto, together with the costs of suit, including reasonable attorneys' fees; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd., rescinding the plans of reorganization and merger of said coroprations with Amfac, Inc. and placing them in their respective positions prior thereto, together with the costs of suit, including reasonable attorneys' fees.

2. (a) Judgment in their favor and in favor of each member of the three classes represented by them in the amount of damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd., and Kekaha Sugar Co., Ltd. in the amount of damages determined to have been sustained, together with the costs of suit, including reasonable attorneys' fees.

3. (a) Judgment in their favor and in favor of each member of the three classes represented by them requiring an accounting by defendants; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. requiring an accounting by defendants.

4. (a) Judgment in their favor and in favor of each member of the three classes represented by them appointing

a receiver to implement the relief prayed for hereunder; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. appointing a receiver to implement the relief prayed for hereunder.

5. (a) Judgment in their favor and in favor of each member of the three classes represented by them awarding punitive damages; and

(b) Derivatively, judgment in favor of The Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. awarding punitive damages.

6. Such other and further relief as may be necessary and appropriate.

/s/ KENNETH P. KIMMEL
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Santa Monica, California 90405

/s/ BRUCE W. KAUFFMAN
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32 East 57th Street
New York, New York 10022

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } *ss.:*

C. JON HANDY, being duly sworn according to law, deposes and says:

That he is one of the plaintiffs in the within action; that he is authorized to and does make this Affidavit for and on behalf of all plaintiffs in the within action; that he has read the foregoing Complaint and knows the contents thereof; and that the facts set forth in the foregoing Complaint are true and correct to the best of his knowledge, information and belief.

NORTHERN ACCEPTANCE TRUST 1065
By /s/ C. JON HANDY
C. Jon Handy, Trustee

Subscribed to and sworn to before me this 13th day of May 1969.

DOMENICA R. DE SIMONE
Notary Public, California
Principal Office in Los Angeles County
My Commission Expires Feb. 16, 1973

CERTIFICATE OF SERVICE.

I hereby certify that on this 17 day of April, 1970, three copies of the Petition for a Writ of Certiorari were sent, postage prepaid, first class mail, air mail, to each of the following:

Honorable William P. Gray
United States District Court
Central District of California
United States Courthouse
312 North Spring Street
Los Angeles, California

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Cades, Cox, Schutte,
Fleming & Wright
First Hawaiian Bank Building
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Honolulu, Hawaii 96808

I further certify that all parties required to be served have been served.

/s/ Bruce W. Kauffman,
Bruce W. Kauffman,
2600 The Fidelity Bldg.,
Philadelphia, Pa. 19109
Atttorney for Petitioners.